74-713

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IN THE

SUPREME COURT

OF THE UNITED STATES

ARMANDO ALVAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

PETITION FOR ARMANDO ALVAREZ

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OF THE UNITED STATES

NO: 74-713

ARMANDO ALVAREZ, *

Petitioner, *

vs. *

UNITED STATES OF AMERICA. *

Respondent. *

PETITION FOR ARMANDO ALVAREZ

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

The Petitioner Armando Alvarez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on November 8, 1974, yet unreported. A Copy of said opinion is hereby attached and Marked Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under the provision of 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

In this multi-count, multi-defendant narcotics conspiracy trial, the prosecution intended to prove that there existed three levels at which the defendant functioned. First, there were the suppliers, (Hovsep, Caramian, Segundo Coronel, Roberto Arenas, and Manuel Noa), then came the distributors, the main one according to the government being Raul Ortega for whom the two main government witnesses Ramiro Gonzalez and Miguel Rodriguez worked. Lastly there were two customers, or buyers, the Appellant Armando Alvarez falling in this category.

The evidence against the appellant Armando Alvarez consisted of the seriously contradicted testimony of Ramiro Gonzalez pertaining to him buying heroin from them on several ocassions.

Appellant contents that even if the testimony of the witnesses is to be believed, evidence of his purchases of heroin does not permit a reasonable inference that he had knowledge of, and participated in, the wide ranging conspiracy charged in the indictment.

Appellant also contends that if in fact he was a participant in a conspiracy, this was a different conspiracy from the one charged in the indictment and the Court's charge as to multiple conspiracy was not adequate and that this was a fatal variance from the indictment.

Further, the Petitioner contends that the chart used by the prosecution in aid of its opening statement was so prejudicial, that from inset of the trial, it deprived the defendant of a fair trial.

Petitioner also contends that the contradictions in the testimony of the governments witness, deprived the defendant of a fair trial, as the government knew the testimony of the witnesses

in advance and was in notice of such conflicts and the irreconcilable differences in their testimony were proper grounds to grant Appellant's counsel Motion for directed verdict at the end of the government's case.

Lastly, the Petitioner contends, that the Court erroneously and inadequately marshalled the evidence.

STATEMENT OF THE FACTS

Appellant and twelve other defendants were charged in the indictment 74 Cr. 18, with conspiracy to import, distribute heroin and with purchasing of six kilograms of heroin.

Trial February 21, 1974 - March 20, 1974

The trial opened over the objection of Petitioner's attorney for a certain chart which the United States' Attorney intended to use in the opening statement (A..1-5). From the very beginning the prosecutor characterized the Petitioner in it's opening statement as a customer or buyer, not a

distributor nor a supplier. (A...7).

Miguel Rodriguez, testified that on January 1971, he plead guilty of several counts of an indictment, charging him with conspiring to distribute narcotics drugs, and in February 1971, was sentenced in the Southern District of New York, to ten years. (A...8-9).

In March 10, 1970, he met Ramiro Gonzalez (A..10) and accepted Gonzalez's request to help him find customers interested in buying 45 kilograms of heroin that Gonzalez had brought to New York from Florida. (A..11-12) and that pursuant to said agreement he contacted several persons, including the Petitioner Armando Alvarez, El Chino, (A..13).

That there came a time when he received a message that the Petitioner had arrived from Puerto Rico and that the Petitioner was trying to locate Ramiro Gonzalez, That a meeting was set up for Ramiro Gonzalez, to meet with the Petitioner at El Alamac Bar, where they met the Petitioner

and Hugo el Mirna. (A..14).

Subsequent thereto, Rodriguez testified that him and Ramiro Gonzalez met with the Petitioner at Prada's Gas Station, but he could not be there on the right time, so he met the Petitioner at 11:00 p.m., at 180th Street and Fort Washington, where he met the Petitioner, and inside the car he delivered the kilogram to the Petitioner. (A.. 16-17).

Rodriguez further testified that the Petitioner left $4,000.00 as part payment of the heroin with Prada, and that Ramiro Gonzalez was upset because that was very little money. That then Gonzalez said he was going to call the Petitioner in Miami and walked out of the place called "El Gallo de Maron" and when he came back inside, instructed him to go to the apartment in 164th Street, where he met a person named Willie and a woman gave him a paper bag with $14,000.00 (A...18-20).

Afterwards, pursuant to Ramiro Gonzalez's instructions, he met again with the Petitioner at Prada's Gas Station to deliver him one and a half kilograms of heroin, but because they were afraid of the place, he met him outside a flower shop located at Broadway and 158 Street, where in the corner he met the Petitioner who had some flowers in his hand and went to his car that was parked below Broadway, where he delivered the heroin to the Petitioner. He stated that he did not remember how the Petitioner was dressed at the time. (A..21-22).

On cross-examination among other things it was brought out that on a certain list of customers, that Rodriguez gave the agents of D.E.A., Petitioner's name did not appear. (A..23-38).

Rodriguez also admitted under cross-examination that petitioner never game him personally the $4,000.00 and the $14,000.00 (A..28), he testified to on direct. (A..18-20).

He also admitted that the first time he met the Petitioner was at the Alamac Bar, (A..29), and that in the coversation that ensued there was no reference made to narcotics. (A..29).

He further admitted that he was shown many pictures during his direct examination of Prada's Gas Station and the 005 Bar at Broadway and 161st Street, and that the Petitioner did not appear in any of them. (A..30).

Ramiro Gonzalez Infante, testified that in June 1968, he plead guilty to possession of a gun in Puerto Rico. That he failed to appear at the time of sentencing, and that on October of 1970, he was arrested on the charges of conspiracy to distribute and distribution of narcotic drugs to federal undercover agents and that in that case he also jumped bail. (A..31). That in February 1972, he was re-arrested in connection with the same charges and after a plea of guilty, to two counts of conspiracy to distribute and distribution he was sentenced in the Southern District of

New York to two terms of 10 years, and to run concurrently. (A..32).

The then testified that on March 1970, he had a conversation with Raul Ortega, in reference to a shipment of 45 kilos of heroin in Miami, Fla. That Ortega told him he needed him to get customers to buy the heroin and that he would give him a 50/50 participation in the business. (A..33-35).

He testified that subsequent thereto, he traveled to New York where he met and saw Armando "El Chino". The Petitioner thru Hugo el Americano who told the Petitioner (El Chino) had heard he had a heroin and was interested in buying it. (A..36-37).

According to Gonzalez he met with Hugo el Americano and the Petitioner at El Alamac Bar, where they discussed the sale of one kilogram of heroin, at $20,000.00 in the presence of Miguel Rodriguez who, agreed to deliver the kilogram. (A..36-40).

After Miguel Rodriguez delivered to the Petitioner the heroin, Gonzalez testified that the Petitioner made directly to him, the payment in two installments at his aunt's house at Broadway and 136th Street. (A...41).

Gonzalez further testified that he met a few days later with the Petitioner at his aunt's house in New York, at which time he agreed to deliver two (2) kilos to the Petitioner the next day at Hugo el Americano's house, which he did. (A.. 49-52). Then seven or eight days later at his aunt's house, when Petitioner came to pay him for the two kilos he agreed to deliver another kilo the next day at Hugo el Americano's house, where they arranged for the delivery from "7 , 8 or 9 days later". He met Petitioner again at his aunt;s home, where they arranged for the delivery of two more kilos of heroin at Broadway and 158th Street, where he met Petitioner dressed in white, with a large necklace and a bouquet of flowers in his hands. Miguel Rodriguez who was driving

the car stopped and he (Gonzalez) rolled down the window and gave it to appellant who kept on walking. (A..54-57).

Manuel Noa, testified that he used to stash heroin for Segundo Coronel, who introduced him to Roberto Arenas and to Hvsep Caramian. (A..59). Coronel Asked him to come to New York sometime in late January 1970, in reference to a shipment of heroin and to contact Roberto Arenas, in New York. (A..60-61), which he did. He then met with Caramian and picked up 60 kilos of heroin at Kennedy Airport. He sold five (5) kilos and returned the rest to Mr. Arenas. (A..62-67).

Roberto Arenas, called as a witness for the government testified that about the 15th day of February, 1970, Manuel Noa returned to him 55 kilos of heroin, and that he delivered it to Raul Ortega, pursuant to instructions from Segundo Coronel.

That the next day, he met with Ortega and Caramian, and Caramian took the 10 kilos from the 55 he had given to Ortega. (A..67-73).

The government rested and counsel for the Petitioner made a Motion to Dismiss the substantive count against the Petitioner on the grounds of duplicity, which the Court denied. (A..74). Counsel moved to acquit the Petitioner on the grounds that the government at the most proved, that the Petitioner to be just a buyer and not a conspirator, which Motion after extensive argument was denied by the Court. (A..75-80).

Charge:

The Court refused to charge multiple conspiracy in the manner requested by the Petitioner's Counsel, and this refusal was excepted to. (A..81-82-83-84).

Verdict: Petitioner was found guilty of Count I (conspiracy) and Count 8, (purchase). (A..85).

Sentence:

The Petitioner was sentenced to two (2) concurrent terms of eight (8) years. (A...86).

POINT I

THERE WAS INSUFFICIENT PROOF FROM WHICH A JURY COULD FIND BEYOND A REASONABLE DOUBT THAT PETITIONER, ALVAREZ, CONSPIRED TO IMPORT, SELL AND DISTRIBUTE HEROIN.

> " Nobody is liable in conspiracy except for the fair impair of the concerted purpose or agreement he understands it, United States v. Peoni, 100 F. 2d 401, 403 (2nd Cir., 1938) (L. Hand., J).

Even viewing the evidence against Petitioner in the light most favorable to the government, it demonstrated at most, that Petitioner made four purchases of heroin from Gonzalez and Rodriguez. If the circumstances surrounding the purchases made by the Petitioner are closely appraised, the logical and only inference that can be drawn is that Petitioner, was not aware, nor interested, nor have anything or any stoke whatsoever nor any knowledge of any on-going wide-ranging conspiracy as that one charged in the indictment, and therefore his conviction was reversed.

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*/For the purpose of Point I, it will be assumed,

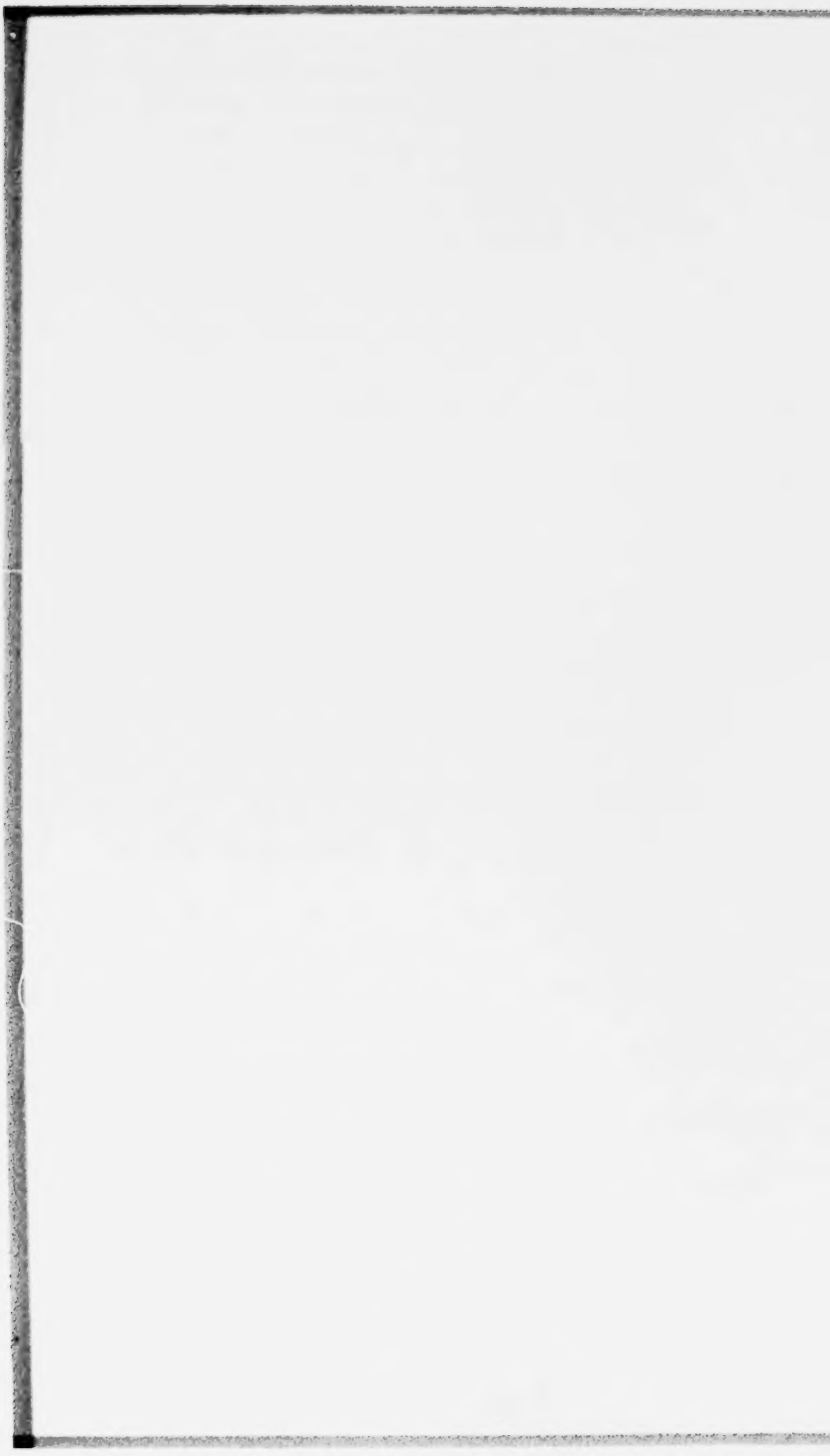
that all of the evidence relating to Count 8 of the indictment, and the verdict was proper. It will, however, be continued in other points in this Brief that it was not so.

In its entirety, the evidence against the Petitioner Alvarez consisted of the testimony of two witnesses, Rodriguez and Gonzalez, both convicted narcotic offenders, who were offering their cooperation to the government, in the hope of having their sentences substantially reduced and not being prosecuted on other offenses. (It must be keptin mind that none of the alleged contraband was produced in Court).

According to Rodriguez's testimony, the Petitioner Alvarez made two (2) purchases of heroin from himself and Ramiro Gonzalez. According to Gonzalez in addition to these two (2) purchases, the Petitioner allegedly made two more purchases from him. This testimony is in itself not sufficient to make the Petitioner a conspirator within the test set forth in United States v. Borelli, 336 F. 2d 376, (2nd Cir. 1964), where at page 385, this Court said:

> "If in Judge Learned Hand's well known phrase, in order for a man to be held for joining others in a conspiracy, he must in some sense promote their venture himself, make it his own, (citing), it becomes essential to determine just what he is promoting and making his own".

There are many the decisions in which the above principle cited in Borelli (supra) from United States v. Falcone, 109 F2d 579, (2nd Cir. 1940) has been appealled in conspiracy cases where as in the instant case, the evidence against the one accused of participating in a conspiracy such as the one at hand here consisted of an isolated purchase of delivery of narcotics. (See: United States v. De Noia 421 F2d 979, 2nd Cir. 1971); United States v. Renia 242 F2d 302 (2nd Cir. 1957); United States v. Koch, 113 F2d 982, (2nd Cir. 1940); United States v. Stromberg 268 F2d 256, (2nd Cir. 1959). United states v. Aviles, 274 F2d 179 (2d Cir. 1960).



We must of course distinghish that in the case at hand and at bar, it is alleged that the Petitioner in more than one instance (four) purchased heroin from the witness. However, the principle enumciated in the above cases is applicable to the Petitioner in this case, since in effect it is not the number of times alone, nor the frequency and regularity, nor the amounts (substantial as they might be), that determines the participation in the conspiracy., but in fact all these factors when taken together and attending circumstances that must be rationable.

For example, in United Statesv Roch, supra, at 893, the Court stated that: from the amount of the cocaine purchased, it can not be inferred that he knew of the conspiracy . Or in the case of united States v. Borelli, supra where the Court found that even though the purchases were frequent and of substantial amount that it would suggest that he was a continuing customer, it in itself

might not have sufficed to warrant submitting questions of Borelli, participation of the Jury.

Perhaphs, the best summary at this point, is found in United States v. Koch, supra, where it is stated:

> "One of the many issues raised by the Petitioner on this Appeal is whether or not the evidence was sufficient to prove that he knowlingly joined the conspiracy to import and dispose of the narcotic.
> It has been argued streanously, that the utmost reach of the proof made him out to be only a isolated purchaser from the conspirators, and not proved guilty of the crime charged in the indictment even though the purchase was unlawful. It is apparent that there is real difficulty in this respect. The amount of the cocaine purchased would, of course indicate that it was taken not for personal consumption alone, but for resale. But the Petitioner was not a steady purchaser from the conspirator and so it cannot be inferred as it was in United States v. De Vasto, 2 Cir. 52 F2d 25 78 A.L.R. 36, that he knew of the conspiracy and was acting to further its ends rather than exclusevely his own.

> Nor does the situation shown in evidence here correspond essentially to that in United States v. Bruno 2. Cir. 105 F2d 921, where the Petitioner knew they were helping carry forward one or more phase of a conspiracy here for aught that appears the Petitioner had no knowledge whatever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro's possession of it was unlawful and that was true also of the sale to and purchased by him. But there was nothing in the evidence to warrant a finding that he knew that Mauro was not, or had not previously been acting alone in getting possession of the drug or how he may have obtained it.
>
> The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the Petitioner participated. They had no agreement to advance any joint interest. The Petitioner brought at a stated price and was under no obligation to Mauro, except to pay him that price. The purchase alone was insufficient to prove the Petitioner a conspirator with Mauro and those who were his co-conspirators. (Dickerson v. United States, 8 Cir. 18 F 2d 887.

It is clear that even in the event that more than one purchase occured the inference cannot be

drawn that Petitioner had knowledge of broader and wide ranging conspiracy, unless, there is independent evidence to support such inference.

The testimony of the trial, strongly rejects the idea that Petitioner had knowledge of the scope and objective of the conspiracy, charged in the indictment.

To being in with, the government itself in its opening statement concede the fact that the customers (the Petitioner) do not know the suppliers. (A..6) and characterized the Petitioner as just a customer. (A...7).

Further, the conversation and dealings between the witnesses and the Petitioner, leading to and the consumation of the alleged purchases are devoid of any indication whatsoever (and for that matter the whole record) (itself) of any interest nor effort on the part of the Petitioner to further any of the objectives of the conspiracy charged. It is obvious from the record that the only interest

the Petitioner had, was it any, to buy heroin at a set price for his own sake and he could not care le ss who, was the supplier, the importer nor the distributor nor he wanted to know it neither.

It must be noted that Petitioner did not know neither one of the government witnesses, until they first met at El Alamac Bar (A...39-36), and that relationship ceased to exist once there was no heroin. Further, the conversation were exclusively dealing with one transaction at the time, which falls within the real of United States v. Reina, supra where it is asserted that this type of conduct is consisted with the position that the Petitioner was an independent peddler of narcotics.

The Petitioner made several purchases from both government witnesses in itself, is not enough evidence that he was involved in the conspiracy charged, and absent of the other independent evidence the conviction must be reversed and the count of conspiracy be dismissed as to the Petitioner.

POINT II

WHETHER OR NOT A SINGLE CONSPIRACY OR MULTIPLE CONSPIRACY WERE PROVEN?

The indictment charged that the Appellant and others were members of a single conspiracy to import heroin, to conceal and distribute heroin, Appellant contends that in fact at least two (2) different and distinct conspiracies were proven and this constitutes a fatal variance from the indictment.

The original conspiracy was made of what the government later decided to characterize as the "suppliers", In this group fall several co-conspirators that are not named in the indictment as defendants mainly because they became government witnesses, in this or/and in other cases, to wit: Roberto Arenas, Segundo Coronel, Manuel Noa and Housep Caramian.

According to the testimony during trial, Coronel sent his man Noa to New York from Miami, Florida, with instructions to see Arenas regarding a heroin shipment and to follow Arenas instructions. (A..60-61). He arrived in New York, on February

2, 1970, and pursuant to his instruction reported to Arenas, (A..61).

On the 5th day of February, Arenas called Noa and asked him to come and see him personally at which time he was instructed to "escort Mr. Caramian to the place he would tell him". (A..62). Noa and Caramian then picked up sixty (60) kilos of heroin at Kennedy International Airport and Noa then stashed it in two different apartments. (A.64) (65).

Noa kept the heroin for three weeks and was able to sell 5 of the 60 kilos. At this point, however, "(he) ..noticed on the streets that (he was) being constantly followed..and he went to see Mr. Arenas to....get rid of the merchandise. (A...65). Arenas told him at this point that "he did'nt have any place to put it, because I am leaving", and that is where the 60 kilos trip ends. (A..66).

It is patently clear from the foregoing that the original conspiracy ended right then and there,

when the distributors Mr. Noa, decided to walk out of it because of his fear of being constantly followed. At this time, Arenas then does find a new distributor, Raul Ortega, who meets with him and Caramian who takes back 10 kilos of heroin, and makes a new arrangement with Ortega, for the fast distribution of the rest of the shipment, to wit: 45 kilos. (A..72).

Ortega in turn recruited Ramiro Gonzalez and offers him 50% of the business if he can get the customers and Gonzalez in turn recruited, Miguel Rodriguez and they set out to sell the heroin to the different defendants most of whom, as the record shows are independent narcotic peddlers, who, have nothing to do with each other, among them the Petitioner Alvarez and little independent rings with no cross-over between them at all.

What this leads up to is, that in fact the Petitioner Alvarez at the most, conspired with Rodriguez and Gonzalez and although he did

not know him had nor any idea of his existence with Ortega, in the alleged purchase of the six (6) kilograms, but not with the prior group - Noa, Caramian, Coronel and Arenas, and much less with the rest of the other defendants, who, were dealing independently with Rodriguez and Gonzalez, in the over all scheme designed to distribute the sixty (60) kilos or the 45 kilos as the case might be. There being in fact, several conspiracies that the defendant must be acquitted.

To say that this whole series of events were a single and continuous conspiracies, is a gross and oversimplicification, which was flatly rejected in United States v. Borelli, supra. It is clear that the government rounded up a group of people, who, were involved in doing the same type of criminal acts and indicted all under the same conspiracy when in fact there were multiple conspiracies, Kotteakos v. United States, 328 U.S. 750.

Further yet, not only more than one conspiracy existed, but the Court failed to give the jury an adequate charge or multiple conspiracies, within the meaning of Kotteakos supra, and Borelli, supra:

> What the evidence must show in order to establish that conspiracy existed is that the members in some way or other, positevely or tacitly, came to a mutual understanding to engage in a common unlawful agreement to violate Section 174 of the Federal Narcotics Laws, which I have just described for you.
>
> All of the members, need not have joined at the inception of the agreement, and I will discuss with you this point more fully later on. In determining whether or not there was such an unlawful agreement, you may judge the acts and conduct of each of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence.
>
> An unlawful agreement may exist even though the individual conspirators may have done some acts in furtherance of the common unlawful purpose apart from, or unknown to, the others.

Proof of several separate and independent conspiracies is not proof of the single overral conspiracy, charged in the indictment, unless one of those conspiracies proved is the single conspiracy charged in the indictment.

What you must determine as to this element is whether the conspiracy charged in the indictment existed between two or more of the alleged conspirators. If you find that no such conspiracy existed then you must acquit all of the defendants on Count I.

In determining whether the alleged conspiracy exists, you may consider what the evidence shows as to changes in personnel and activity. You may find a single conspiracy even though there charges in personnel or activities provided that you find that some of the conspirators continued thoughout the life of the conspiracy and that the purpose of the conspiracy continued to be that charged in the indictment. The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants, the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry

out the scheme while others were not active or had terminated their relationship.

In addition to charge contained what is known as " the all or nothing charge".

> What you must determine as to this element is whether the conspiracy charged in the indictment existed between two or more of the alleged conspirators. If you find that no such conspiracy existed, then you must acquit all of the defendants on Count 1.

Condenned in United States v. Borelli, supra

Wherefore, the Appellant respectfully contends that this conviction of the conspiracy count must be reversed and the count dismissed because the proof established multiple conspiracies, which constitutes a fatal variance; and that the charge given to the jury demand a reversal.

POINT III

THE COURT SHOULD HAVE GRANTED PETITIONER'S MOTION FOR A DIRECTED VERDICT.

At the end of the government's case, Petitioner's attorney made a Motion for Directed Verdict, as to the substantive Court, on the grounds that the government had not proved it's case against the Petitioner, which Motion was denied. (A..74).

Count Eight of the Indictment charged the Defendant as follows:

COUNT EIGHT

The Grand Jury further charges:

In or about the months of March and April, 1970, in the Southern District of New york, Armando Alvarez a/k/a Armando Alvarez, a/k/a Armando Garcia, a/k/a Andres Alvarez, a/k/a Joaquin Gonzalez, a/k/a El Chino, the defendant, unlawfully, wilfully and knowlingly did, in fact, receive conceal, buy, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit: approximately six kilograms of heroin, after the said narcotics drug had been imported and brought to the United States, contrary to law, knowing that the said narcotic drug had theretofore been

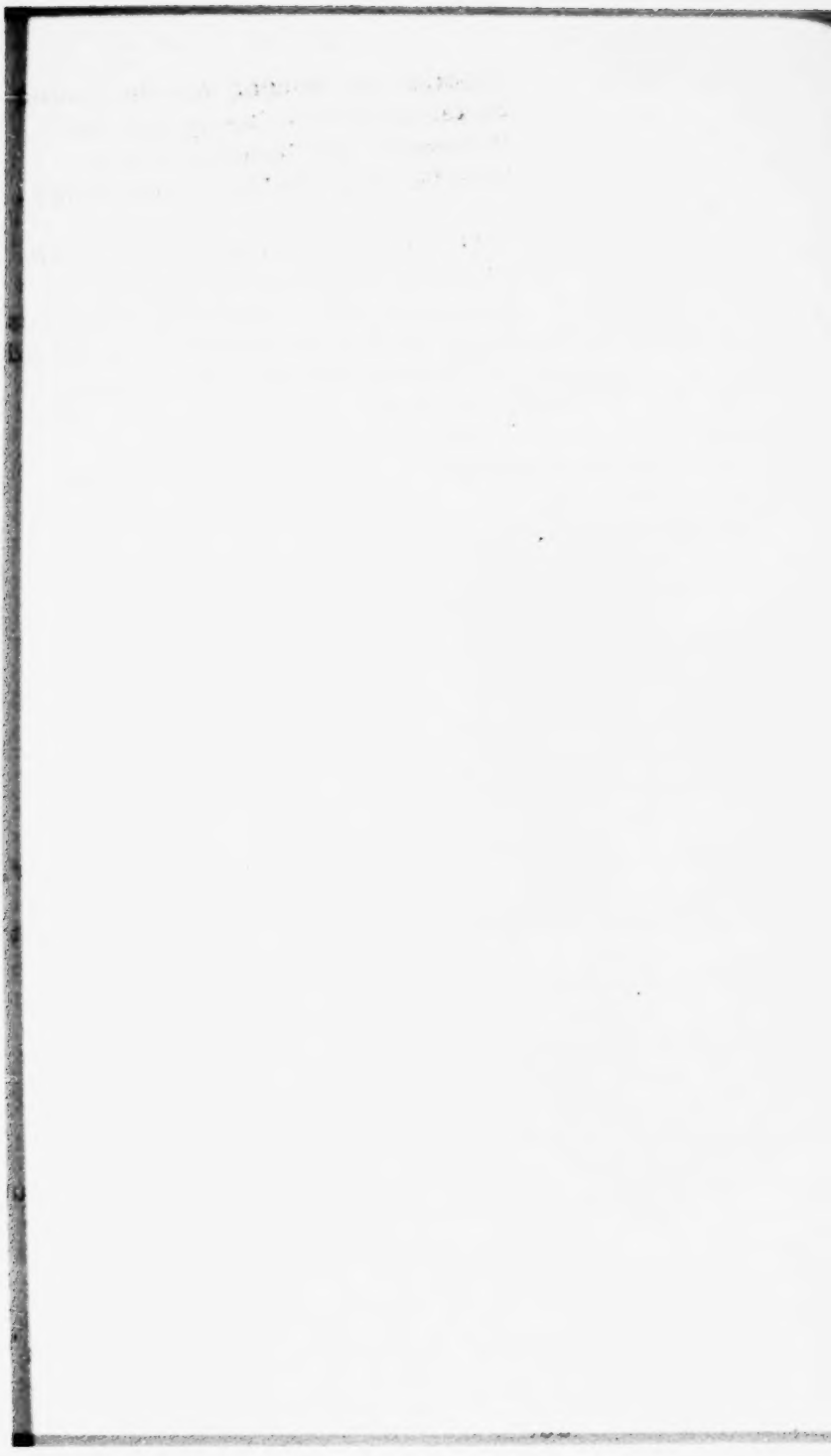
> imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States.
>
> Except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotic and Dangerous Drugs finds to be necessary to provide for Medical and Legitimate uses only, is prohibited.

The proof presented at the trial, showed that this charge was the result of at least four or five different purchases by the Appellant from Ramiro Gonzalez, each being an independent transaction.

Not only was the proof offered at trial at variance with the charge itself, but in addition it was presented in such a confused and contradictory manner, that the jury could not have without a reasonable doubt find the Defendant guilty.

For instance:

> A.- Rodriguez claimed, that him and Gonzalez met the Petitioner at the Alamac Bar for the first time, but that there was no discussion of narcotics. (A..14).
>
> A.1- Gonzalez states that at that same meeting, him and Rodriguez



discussed with the Defendant-Petitioner the purchase of one (1) kilo of heroin, price and place of distribution.

B.- Rodriguez claimed that Petitioner paid thru Prada four thousand ($4,000.00) Dollars to him as part payment for said kilo and later received from Willie $14,000.00 more. (A..18-20)

B.1- Gonzalez testified that the said payment was made by the Petitioner to him, personally at his aunt's house at Broadway and 136th Street, and for the amount of $20,000.00 (A...41).

C.- Rodriguez claimed that he made by himself and delivered of one and a half (1 1/2) kilos of heroin to Petitioner outside his car in the corder of the flower shop at Broadway and 158th Street. (A..21-22).

C.1- Gonzalez in turn testified that he was the one that made the delivery from the car which Rodriguez was driving and he clearly remembers how the Petitioner was dressed that day. (A...54-57).

It is Petitioner's contention that from the above irreconcilable differences, in the testimony of government witnesses, the jury could not find the Defendant guilty of "receiving, buying, selling, concealing, facilitating the transportation

of six kilograms of heroin as charged in the indictment as the testimony shows that there is an absolute conflict as to where the Agreement was made, the price paid for and more importat, both claim to have made the same deliveries and a ccepted different sums of moneys at the same time.

POINT IV

THE TRIAL COURT'S CHARGED CONTAINED REVERSIBLE ERROR

A.- The Marshaling of the Evidence.

The trial Court in its charge to the jury, marshaled the evidence to which counsel for the Petitioner Alvarez except to (A...82-A).

It is Petitioner's contention that the marshaling of the evidence was totally prejudicial as it included the testimony that was presented by the witnesses Rodriguez and Gonzalez against the Petitioner, but totally ignored the serious contradiction in thér testimony.

This type of marshalling coming from the bench at the end of the trial court have but one effect in the mind of the jury.

The guilt of the Petitioner.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE GOVERNMENT TO USE A CHART IN IT'S OPENING STATEMENT.

At the very beginning of this trial, the prosecutor informed the Court that it intended to use a Chart to help the presentation of its opening statement to the jury.

This was strenously objected the defendant's counsel, However, the Court overruled the objection and allowed said Chart's use.

The Petitioner contends that this chart staring at the jury before any evidence whatsoever is presented by the government with its pictorial value shown to the jury, at the outset of the trial by the prosecutor, labelling the Appellant as a "buyer of heroin" was inflamatory and prejudicial to such an extent that it could not be cured by any possible defense as it created upon the mind of the jurors the guilt of the defendant. This act being done with the full power and majesty of the attorney for the United States, before a jury, which made it highly believable.

The 6th Amendment of the Consitution clothes the Defendant with the right to face the witnesses against him , in a criminal prosectuion and to cross-examine them, the chart used by the Government was a "silent witness", deprived the Defendant of a fair trial and at the time of it's legend explanation to the jury by the prosecution, labelling the defendant as a "buyer", planted in the minds of the jurors, the guilt of the defendant, in contravention of Defendant's God given rights , under the 6th and XIV Amendments to the Constitution. This was mortal and reversible error.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari be granted.

Dated at Miami, Florida this ____day of November, 1974.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, GINO P. NEGRETTI, hereby certify that a true and correct copy of the Petition for Writ of Certiorari, was on this ____ day of " November , 1974, mailed to SOLICITOR GENERAL, Department of Justice, Washington, D.C.

GINO P. NEGRETTI

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-713
ARMANDO ALVAREZ, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5684
JORGE INFIESTA, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5685
DOMINGO DEL CRISTO, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5736
CHARLES BUSIGO-CIFRE, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5804
CIRO RODRIGUEZ CALANA, PETITIONER
v.
UNITED STATES OF AMERICA

NO. 74-5827
CIRILO FIGUEROA, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 506 F.2d 455.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1974. The petition in No. 74–713 was timely filed on December 7, 1974, and the petitions in Nos. 74–5684 and 74–5685 were timely filed on December 9. Mr. Justice Marshall extended the time for filing in No. 74–5804 to January 7, 1975, and the petition was timely filed on January 3, 1975. The petitions in Nos. 74–5736 and 74–5827 were filed on December 19, 1974, and January 9, 1975, respectively, no extension of time having been granted; they are thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the court's conclusion that there was a single conspiracy.

2. Whether the evidence was sufficient to support the conspiracy convictions of petitioners Del Cristo and Alvarez.

3. Whether the acquittal of petitioner Cifre on the substantive count precludes his conviction on the conspiracy count.

4. Whether petitioners Infiesta and Calana were denied the effective assistance of counsel.

5. Whether the government improperly used a chart in presenting its case to the jury.

6. Whether the trial court improperly marshaled the evidence for the jury.

7. Whether the prosecution of petitioner Figueroa was the result of impermissible prosecutorial selectivity.

8. Whether petitioner Figueroa's conviction is precluded by a previous conviction for dealing in heroin.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners Alvarez, Infiesta, Calana, Del Cristo and Figueroa were convicted of substantive and conspiracy counts involving trafficking in heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. Petitioner Cifre, although acquitted on the substantive count, was convicted on the conspiracy count. Petitioners received the following sentences: Alvarez, Figueroa, and Infiesta, concurrent terms of eight years' imprisonment; Calana, concurrent terms of six years' imprisonment; Del Cristo, concurrent terms of ten years' imprisonment; Cifre, ten years' imprisonment.

Briefly summarized, the evidence adduced at trial revealed a complex chain-type conspiracy that purchased heroin in large quantities, diluted and transported it, and resold it for eventual street sale. In early 1970, Raul Ortega-Alvarez[1] possessed some 55 kilos of heroin, which had been imported from South America (T. 687–699, 736–749). The heroin was stored at the home of petitioner Calana, who received $1,000 per kilo. There it was cut and mixed for delivery in large quantities to the next level of dealers (T. 107,

[1] Ortega-Alvarez also was convicted but is not a petitioner here.

113–117, 823–826, 832–836). On at least one occasion the heroin was prepared for delivery at petitioner Infiesta's home, in his presence and with his help (T. 149–150, 868).

Co-conspirators Miguel Rodriguez and Romero Gonzalez[2] generally handled the day-to-day transactions for Ortega. The sales were made on credit, with the intermediate "retailer" making payments after he had disposed of some of the heroin. In this manner, petitioners Infiesta (T. 869, 871–872), Figueroa (T. 214–225), Cifre (T. 158–161, 884–891), Del Cristo (T. 225–229, 891–898), and Alvarez (T. 231–234, 899–904, 909–922) took possession of and subsequently paid for large quantities of heroin. Each was implicated in at least two transactions, involving from one to six and one-half kilos.

With the exception noted at page 9, *infra*, the court of appeals considered and rejected the arguments made here.

ARGUMENT

1. Petitioners Alvarez, Del Cristo, and Figueroa contend that the evidence showed that they were involved in multiple conspiracies rather than the single conspiracy with which they were charged and for which they were convicted. The thrust of their argument is that the evidence established a separate conspiracy for each transaction. This claim was

[2] Rodriguez and Gonzalez pleaded guilty and were sentenced to terms of ten and six years' imprisonment, respectively.

answered in the opinion of the court below, on which we rely (506 F. 2d at 457):

> * * * [w]hen large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture, the success of which depends on the performances of others whose identities he may not even know. *United States* v. *Mallah*, 503 F. 2d 971, 983–4 (2d Cir. 1974); *United States* v. *Arroyo*, 494 F. 2d 1316, 1319 (2d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3005 (April 22, 1974) (No. 1574); *United States* v. *Bynum*, 485 F. 2d 490, 495–496 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S. Ct. 2598, 41 L. Ed. 2d 209 (1974). The jury in this case had sufficient evidence to find that there was a single conspiracy, even though several of the members participated directly in relatively few of the transactions involved.

See also *Blumenthal* v. *United States*, 332 U.S. 539, 556–559.

2. a. Petitioner Del Cristo argues that the evidence was insufficient to support his conviction. He contends that non-hearsay evidence linking him to the conspiracy was lacking and that the government did not prove he had possessed heroin. These claims are not supported by the record.

Rodriguez testified that he had discussed with Del Cristo the possibility of a purchase of heroin and that he had so informed Ortega-Alvarez (T. 224–226). Subsequently, Del Cristo made a payment to Rodriguez at a bar (T. 225–227). Similarly, Gonzalez testified that he and Del Cristo agreed to the purchase of heroin on credit and that Del Cristo had difficulty in

making payments on that purchase (T. 891–896). This is sufficient non-hearsay evidence to link Del Cristo to the conspiracy, and to allow hearsay declarations to be used against him.

The fact that Gonzales and Rodriguez disagreed on whether Rodriguez had delivered heroin to Del Cristo is not fatal to the government's case. The jury could, of course, have found Gonzales to be the more credible of the two and accepted his version of events. Moreover, even had the jury believed Rodriguez, it still could have convicted Del Cristo because both witnesses agreed that Del Cristo was negotiating for the purchase of a substantial quantity of heroin and that he subsequently began making payments to Rodriguez. From this the jury could properly have inferred that another of the conspirators (perhaps Ortega-Alvarez) had delivered the heroin that Del Cristo had agreed to purchase and for which he began making payments.[3]

b. Alvarez contends that he could not properly have been convicted on the substantive count because of discrepancies between the testimony of Gonzales and Rodriguez. Although, as Alvarez points out, the witnesses' recollection differed as to the exact quantity,

[3] Del Cristo also challenges the indictment on the ground that the evidence presented to the grand jury was insufficient to allow it to indict him. However, in *Costello* v. *United States*, 350 U.S. 359, 363, this Court stated: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." Accord, *United States* v. *Calandra*, 414 U.S. 338, 345.

price, and delivery arrangements, both agreed that Alvarez purchased approximately 6 kilograms of heroin in four separate purchases (T. 231–234, 237–238, 899–904, 909–922, 948–949). In such a situation there exists sufficient evidence to allow the case to go to the jury; absolute consistency among witnesses is not required.[4]

3. Petitioner Cifre contends that his conviction on the conspiracy count cannot stand because he was acquitted on the substantive count. But it is well settled that inconsistent verdicts are within the prerogative of a jury and do not mandate reversal. *Hamling* v. *United States*, No. 73–507, decided June 24, 1974, slip op. 10–11; *Dunn* v. *United States*, 284 U.S. 390. Nor was the acquittal on the substantive count necessarily inconsistent with conviction on the conspiracy charge. The jury could have found persuasive the testimony that petitioner and Gonzales discussed a purchase of a large quantity of heroin (T. 884–886). This meeting would support the conspiracy conviction while permitting the jury to entertain a reasonable doubt as to petitioner's role in the two purchases, which were carried out through intermediaries (T. 886–887).

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[4] The conclusion of the court of appeals that "when large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture" also answers Alvarez's claim that the evidence was insufficient to demonstrate his participation in the conspiracy. In any event, Alvarez received concurrent sentences on the conspiracy and substantive counts, and the Court need not consider this claim, which is addressed only to the conspiracy count. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

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4. a. Petitioner Infiesta contends that he was inadequately represented by counsel at trial because his attorney did not sufficiently develop discrepancies between the testimony of Gonzales and that of Rodriguez. He also urges this Court to reconcile the conflict between those courts that hew to the "farce and mockery of justice" standard (as does the court below) and those courts that have adopted the more lenient "whether the defendant received reasonably competent representation" standard (Infiesta Pet. 15). We submit that since Infiesta's claim must fall under any standard, there is no occasion to review this issue in his case.[5]

The discrepancies to which Infiesta refers—including the identities of the parties who were present at

[5] As petitioner notes, the various circuits use different phrases to describe the standard to be used in evaluating the adequacy of counsel. The First, Second, Seventh, Eighth, Ninth, and Tenth Circuits subscribe to the view that representation is inadequate only if the trial was reduced to a "farce or a mockery of justice" or if the court's conscience is shocked. *Allen* v. *Van Cantfort*, 436 F. 2d 625, 630 (C.A. 1), certiorari denied, 402 U.S. 1008; *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333 (C.A. 2); *United States* v. *Robinson*, 502 F. 2d 894, 896 (C.A. 7); *McQueen* v. *Swenson*, 498 F. 2d 207 (C.A. 8); *United States* v. *Miranda*, 470 F. 2d 1362 (C.A. 9), certiorari denied, 411 U.S. 934; *Brazer* v. *United States*, 432 F. 2d 931 (C.A. 10). On the other hand the District of Columbia Circuit uses the standard "reasonably competent assistance." *United States* v. *DeCoster*, 487 F. 2d 1197, 1202 (C.A.D.C.); the Third Circuit requires the "customary skill and knowledge which normally prevails at the time and place," *Moore* v. *United States*, 432 F. 2d 730, 736 (C.A. 3 *en banc*); and the Fifth and Sixth Circuits hold that counsel must be "reasonably likely to render effective assistance." *Herring* v. *Estelle*, 491 F. 2d 125, 127-128 (C.A. 5); *Beasley* v. *United States*, 491 F. 2d 687, 696 (C.A. 6).

a conspiratorial meeting and whether petitioner left that meeting with one or with one and one-half kilos of heroin—were not crucial to the government's case. Both witnesses agreed that petitioner was present and had left with a large quantity of heroin. In such a situation, the strategy Infiesta's trial counsel pursued—an attempt to persuade the jury that the two witnesses had invented and then conformed their stories in order to gain their freedom—was a reasonable one, securing to Infiesta both the chance of success that tactic could produce and the benefit of any successful impeachment by the other attorneys, some of whom were emphasizing discrepancies in the testimony of the government witnesses.

Even assuming that this tactic was unwise, however, Infiesta is entitled to no relief. Errors of judgment or tactical decisions that may appear deficient in retrospect do not establish a denial of effective assistance of counsel under any standard. See, *e.g.*, *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A.D.C.); *Odom* v. *United States*, 377 F. 2d 853 (C.A. 5); *United States* v. *Grant*, 489 F. 2d 27 (C.A. 8); *Opie* v. *Meacham*, 419 F. 2d 465 (C.A. 10), certiorari denied, 399 U.S. 927.

b. Petitioner Calana also urges that he was denied the assistance of counsel because he and his wife, although represented by the same counsel, had antagonistic defenses. This claim was not raised in the court of appeals.[6]

[6] This claim is not of such exceptional importance that it should be considered despite the failure to present it to the court of appeals. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2.

Before an appellate court will hold that an accused has been denied the adequate assistance of counsel because of joint representation at trial, he must demonstrate the existence of a real conflict of interest or some specific instance of prejudice resulting from that joint representation. See, *e.g.*, *United States* v. *Wisniewski*, 478 F. 2d 274 (C.A. 2). Here, petitioner makes no showing that any conflict existed between his wife's position and his. Rather, he simply points to three facets of his defense, and urges that counsel should have represented him as adequately as counsel represented his wife, who was acquitted. He alleges that because his wife testified while he did not, because she did not exculpate him, and because counsel devoted more time to the summation of her case than to his, an antagonistic position is demonstrated. This is inaccurate, and there is no reason why these actions would have been affected by the joint representation. There was in fact no conflict in the defenses. Both Calana and his wife denied participation in the conspiracy. The latter's defense was more developed because she was able to testify that she had been at work during the times alleged in the indictment and therefore knew nothing about any drug sales.

The trial court was aware that joint representation may lead to problems of conflict of interest in a complex conspiracy trial. The court explicitly inquired of defense counsel whether he "could represent both" petitioner and his wife; counsel responded that "there doesn't seem to be a problem."[7] Counsel went on to

[7] This exchange took place at a pretrial hearing on November 5, 1973. A transcript of that hearing is reproduced as an appendix to this brief.

explain that following discovery he "would be in a better position to determine" whether a conflict would arise and would alert the court if it did. In this situation, where the court made inquiry and was informed that there did not appear to be a problem, it would require a showing more substantial than that made here by petitioner to demonstrate that such a conflict later arose and might have affected counsel's litigation strategy.

5. Petitioner Alvarez contends that the government's use of a chart in its opening statement constituted reversible error. The chart consisted of 3 columns: in the first were listed the alleged suppliers, in the second the alleged distributors, and in the third the alleged customers. The names of the defendants who were actually on trial were in red, and all others were blue. The court did not abuse its discretion in allowing the government to use this chart in order to produce clarity as it attempted to outline for the jury its case against the defendants; defendants have no right to a confused jury. See, *e.g., United States* v. *Ellenbogen,* 365 F. 2d 982, 988 (C.A. 2), certiorari denied, 386 U.S. 923; *United States* v. *Brickey,* 426 F. 2d 680, 686–687 (C.A. 8), certiorari denied, 400 U.S. 828. The situation might be different if the chart contained inadmissible and prejudicial information, or if it made material claims never substantiated by evidence, but that was not the case here.

6. Alvarez also contends that reversible error was committed in the trial court's marshaling of the evidence because, although the court summarized the testimony of Gonzales and Rodriguez, it "totally

ignored the serious contradiction in this testimony" (Pet. 24). This claim is not borne out by the record. The court's summary dealt with the defense case and explicitly set forth seven instances of alleged inconsistencies and contradictions in the witnesses' testimony (T. 2377–2381). See *United States* v. *Tourine*, 428 F. 2d 865, 869 (C.A. 2), certiorari denied *sub nom. Burtman* v. *United States*, 400 U.S. 1020.

7. Petitioner Figueroa contends "that he was singled out for prosecution while other important figures in the conspiracy were not indicted or prosecuted" (Pet. Point I). As the court below stated (506 F. 2d at 458):

> * * * [A] defendant claiming a discriminatory prosecution must show not only that others similarly situated were not prosecuted but also that the decision to prosecute him was based on impermissible considerations such as race or religion. See *United States* v. *Bland*, 153 U.S. App. D.C. 254, 472 F. 2d 1329, 1336 (1972), cert. denied, 412 U.S. 909, 93 S. Ct. 2294, 36 L. Ed. 2d 975 (1973); cf. *Oyler* v. *Boles*, 308 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). Figueroa has failed even to allege such invidious discrimination in this case.

8. Finally, petitioner Figueroa contends that his prosecution is barred by the Double Jeopardy Clause because he was convicted in 1972 of selling heroin on February 19 and March 25, 1970.[5] But these two sales of heroin do not involve the same transactions for which Figueroa was convicted in the instant case.

[5] This amplification of Figueroa's claim is derived from his court of appeals brief.

The conspiracy count on which Figueroa now stands convicted is maintainable even if the sales involved in the 1972 conviction took place as part of this conspiracy; a conviction for an overt act of the conspiracy does not bar later conviction for the conspiracy itself. *United States* v. *Cioffi*, 487 F. 2d 492, 497 (C.A. 2), certiorari denied *sub nom. Cinzio* v. *United States*, 416 U.S. 995, rehearing denied, 417 U.S. 978. Count Eleven, the substantive count on which Figueroa was convicted in the instant case, charged (and the evidence showed) that Figueroa purchased heroin on six separate occasions during March and April, 1970, from Rodriguez and Gonzalez. Because Figueroa's 1972 conviction involved a sale (rather than a purchase) of heroin, the substantive offense of which he was convicted here involves a criminal transaction distinct from that supporting the previous conviction, and Figueroa was not placed in a second jeopardy for the same events.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
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JOHN C. KEENEY,
Acting Assistant Attorney General.
SIDNEY M. GLAZER.
TERENCE M. BROWN,
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MARCH 1975.

APPENDIX

UNITED STATES OF AMERICA

v.

DOMINGO DEL CRISTO, ET AL.

73 Cr. 950

New York, November 5, 1973

Room 705

Before: Hon. CHARLES M. METZNER, D.J.

For the Government: *Shirah Neiman, Esq.*

For Defendants Ciro Calana and Francisca Calana: *Hudson Reid, Esq.*

The COURT. Who else do we have?

Ms. NEIMAN. Mr. Calana, your Honor, who has not yet been brought over from West Street.

Mr. REID. I waive Mr. Calana's appearance, your Honor, for the purposes of a bail application.

The COURT. We have two problems here, the bail application——

Mr. REID. And also to exonerate the bail on Mrs. Calana and put her on parole.

The COURT. I see.

Mr. REID. Could we take Mrs. Calana first?

The COURT. I asked you to determine whether you could represent both of them.

Mr. REID. Your Honor, I tried to make a determination based on the interview with her Friday and today and there doesn't seem to be a problem. Yet once again the Court is well aware of the fact that it may arise. It depends on the evidence that the U.S. At-

torney presents at trial. I don't envisage a problem at this time.

The COURT. I don't want to appoint an attorney in the middle of a six-week trial, find out that there is a conflict.

Ms. NEIMAN. I don't think there is one, your Honor, especially in view of the fact that neither one can testify against the other.

Mr. REID. Not only that. After the motions are filed I do believe that any discovery items given by the U.S. Attorney's office, I would then be in a better position to determine, until the motions are filed, because it does allege a conspiracy.

The COURT. That's fair enough. You will continue as representing both of them, but you have to let me know promptly after you receive the information, because I don't want too much time to drag before we have to find another attorney.

Mr. REID. I expect to have my motions filed by December 1st and the return date is the 15th.

Any answering affidavits the Assistant U.S. Attorney gives me, in that time period I would be able to ascertain whether there would be a conflict, by the 15th of December.

The COURT. All right.

Mr. REID. Your Honor, once again I have had an interview with Mrs. Calana.

The COURT. Do you know her real name or correct name? We had a great deal of difficulty on Friday ascertaining it.

The INTERPRETER. Francisco Calana.

The COURT. What was her maiden name?

The INTERPRETER. Ortega.

The COURT. Is it the usual practice to have her called Francisca Calana Ortega?

The INTERPRETER. No. Only Calana.

The COURT. You will have to amend your indictment somehow, Miss Neiman, to correct this. Francisca Calana doesn't seem close to Ortega Rodriguez.

Ms. NEIMAN. Rodriguez is her husband's mother's name and the information I got was that this was the way she was known and that is the way my witnesses refer to her. We could probably amend the indictment so that the first name reflects what she calls herself.

U.S. GOVERNMENT PRINTING OFFICE: 1978